Supreme Court, U.S.
FILED
AUG 17 2009
OFFICE OF THE CLERK

No. 08-1546

In the Supreme Court of the United States

KENNETH C. KEENER, WILLIAM P. SMITH, AND ANNE D. SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN A. DICICCO
Acting Assistant Attorney General
MICHAEL J. HAUNGS
DEBORAH K. SNYDER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Petitioners filed suit for refunds of federal income tax in connection with their investments in tax-shelter partnerships. Under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), the proper tax treatment of partnership items is determined at the partnership level in a unified audit and judicial proceeding. TEFRA further provides that individual partner-level suits may not be brought for tax refunds "attributable to partnership items." 26 U.S.C. 7422(h). The questions presented are as follows:

1. Whether the Court of Federal Claims correctly declined to entertain petitioners' refund action challenging the assessment of interest under now-repealed 26 U.S.C. 6621(c) (1988) for the partnerships' tax motivated transactions.

2. Whether the Court of Federal Claims correctly declined to entertain petitioners' refund action challenging the timeliness of the assessments of tax and interest attributable to partnership items.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 17

TABLE OF AUTHORITIES

Cases:

AD Global Fund, LLC v. *United States*, 481 F.3d 1351 (Fed. Cir. 2007) 14
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) ... 6, 15
Chimblo v. *Commissioner*, 177 F.3d 119 (2d Cir. 1999), cert. denied, 528 U.S. 1154 (2000) 16
C-99 Ltd. v. *Commissioner*, 66 T.C.M. (CCH) 1485 (1993) 15
Davenport Recycling Assocs. v. *Commissioner*, 220 F.3d 1255 (11th Cir. 2000) 16
Field v. *United States*:
328 F.3d 58 (2d. Cir. 2003) 11
381 F.3d 109 (2d. Cir. 2004) 12
Genesis Oil & Gas, Ltd. v. *Commissioner*, 93 T.C. 562 (1989) 15
Kaplan v. *United States*, 133 F.3d 469 (7th Cir. 1998) ... 16
Keller v. *Commissioner*, 568 F.3d 710 (9th. Cir. 2009) 12, 13
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 9
Nault v. *United States*, 517 F.3d 2 (1st Cir. 2008) 10

Cases—Continued: Page

Prochorenko v. *United States*, 243 F.3d 1359 (Fed. Cir. 2001) 13
Randell v. *United States*, 64 F.3d 101 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996) 10
Rhone-Poulenc Surfactants & Specialities, L.P. v. *Commissioner*, 114 T.C. 533 (2000) 15
River City Ranches v. *Commissioner*, 313 Fed. Appx. 935 (9th Cir. 2009) 13
River City Ranches #1 Ltd. v. *Commissioner*, 401 F.3d 1136 (9th Cir. 2005) 10, 13
RJT Invs. X v. *Commissioner*, 491 F.3d 732 (8th Cir. 2007) 10
United States v. *Dalm*, 494 U.S. 596 (1990) 9
Weiner v. *United States*, 389 F.3d 152 (5th Cir. 2004), cert. denied, 544 U.S. 1050 (2005) 11, 16
Wisniewski v. *United States*, 353 U.S. 901 (1957) 13

Statutes and regulation:

Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 144(a), 98 Stat. 494 8
Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106:
§ 7721(a), 103 Stat. 2399 8
§ 7721(b), 103 Stat. 2399 ..... 8, 13
§ 7721(d), 103 Stat. 2400 ..... 8, 13
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324:
§ 402(a), 96 Stat. 648 2
§ 402(c)(11), 96 Stat. 668 3

Statutes and regulation—Continued: Page

Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1239(b), 111 Stat. 1027 15
Tax Reform Act of 1986, Pub. L. No. 99-514, § 1511(a), 100 Stat. 2744 8
26 U.S.C. 701 14
26 U.S.C. 6221 3
26 U.S.C. 6223(a)(2) 2
26 U.S.C. 6223(d)(2) 2
26 U.S.C. 6225(a) 2, 9
26 U.S.C. 6226 4
26 U.S.C. 6226(a) 9
26 U.S.C. 6226(c) 2, 4
26 U.S.C. 6226(d) 2
26 U.S.C. 6226(d)(1) 16
26 U.S.C. 6226(f) 2, 3, 9
26 U.S.C. 6229 ..... 5, 14
26 U.S.C. 6229(a) 5, 14
26 U.S.C. 6229(b)(1)(B) 14
26 U.S.C. 6229(d) 9, 14
26 U.S.C. 6231(a) 2
26 U.S.C. 6231(a)(3) 2, 6, 10, 14, 15
26 U.S.C. 6231(b)(1)(C) 9
26 U.S.C. 6330(c)(2)(B) 12
26 U.S.C. 6501 14
26 U.S.C. 6501(a) 5
26 U.S.C. 6601 12
26 U.S.C. 6621(c) (1988) ..... *passim*

Statute and regulation—Continued: Page

26 U.S.C. 6621(c)(3)(A) (1988) 8, 9
26 U.S.C. 6621(c)(3)(A)(v) (1988) 5
26 U.S.C. 7422(h) ..... *passim*
26 C.F.R. 301.6231(a)(3)-1(b) 2, 6, 10, 15

Miscellaneous:

H.R. Conf. Rep. No. 760, 97th Cong., 2d Sess. (1982) 2
H.R. Rep. No. 247, 101st Cong., 1st Sess. (1989) 8
Staff of the Joint Comm. on Taxation, 98th Cong., 2d Sess., *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984* (1984) 8

In the Supreme Court of the United States

No. 08-1546

KENNETH C. KEENER, WILLIAM P. SMITH, AND ANNE D. SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 551 F.3d 1358. The opinion of the Court of Federal Claims (Pet. App. 18-50) is reported at 76 Fed. Cl. 455.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2009. A petition for rehearing was denied on March 18, 2009 (Pet. App. 163-164). The petition for a writ of certiorari was filed on June 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. To achieve consistent tax treatment of all partners in the same partnership and to remove the substan-

tial administrative burden occasioned by duplicative audits and litigation, Congress enacted coordinated procedures for determining the proper treatment of "partnership items" at the partnership level in a single, unified audit and judicial proceeding. See Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 402(a), 96 Stat. 648; H.R. Conf. Rep. No. 760, 97th Cong., 2d Sess. 599-600 (1982). TEFRA defines the term "partnership item" as—

> any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

26 U.S.C. 6231(a)(3). Regulations promulgated under Section 6231(a)'s grant of rulemaking authority provide that the term "partnership item" includes "the legal and factual determinations that underlie the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc." 26 C.F.R. 301.6231(a)(3)-1(b).

When the Internal Revenue Service (IRS) disagrees with a partnership's reporting of any partnership item, it must issue a Notice of Final Partnership Administrative Adjustment (FPAA) before making against the partners any assessments attributable to that item. 26 U.S.C. 6223(a)(2) and (d)(2), 6225(a). If a petition contesting adjustments in an FPAA is filed, all partners with interests in the outcome are treated as parties (26 U.S.C. 6226(c) and (d)), and the court has jurisdiction to determine all partnership items to which the FPAA relates (26 U.S.C. 6226(f)).

As part of TEFRA, Congress enacted the provision codified at 26 U.S.C. 7422(h). TEFRA § 402(c)(11), 96 Stat. 668. Section 7422(h), as relevant here, precludes any action for a tax refund "attributable to partnership items."[1] The statutory scheme provides instead that tax treatment of any partnership item "shall be determined at the partnership level." 26 U.S.C. 6221. Accordingly, partners who intend to contest partnership items may do so only in the unified partnership proceeding, where the court "shall have jurisdiction to determine all partnership items of the partnership." 26 U.S.C. 6226(f).

2. a. Petitioners invested in limited partnerships promoted by AMCOR, a California corporation that "was in the business of promoting tax shelter partnerships" during the early to mid-1980s. Pet. App. 3. Petitioners reported their distributive shares of partnership losses on their 1984 and 1985 individual income tax returns and used those losses to offset their taxable income in those years. *Ibid.* The IRS examined the partnerships' tax returns and issued an FPAA to each partnership in 1991. *Ibid.* The FPAAs disallowed the loss deductions reported by the partnerships in 1984 and 1985 and, accordingly, reduced those deductions to zero. *Ibid.* Each FPAA stated that the deductions were not allowable because, *inter alia*, "[t]he partnership's activities constitute a series of sham transactions." *Ibid.*

---

[1] Section 7422(h) states:

> No action may be brought for a refund attributable to partnership items (as defined in section 6231(a)(3)) except as provided in section 6228(b) or section 6230(c).

26 U.S.C. 7422(h). Petitioners do not contend that either specified exception applies here.

In response, certain partners filed petitions in the Tax Court for readjustment of partnership items pursuant to 26 U.S.C. 6226. Pet. App. 3. In those petitions, the partners claimed that the period for assessing tax attributable to the adjusted partnership items had expired prior to issuance of the FPAAs and that the IRS had erred in determining that the partnerships' activities constituted a series of sham transactions. *Ibid.* Because petitioners were partners in the partnerships, they automatically became parties to the suit. See 26 U.S.C. 6226(c).

While the partnership proceedings were pending in the Tax Court, petitioners settled some of their disputed partnership items with the IRS. Pet. App. 4. In the settlement agreements, petitioners were permitted to report a portion of the previously disallowed deductions. *Ibid.* In return, petitioners agreed to waive the restrictions on the assessment and collection of any deficiency attributable to partnership items and also agreed that they would not file any refund claim based on any change in the treatment of partnership items. *Id.* at 4, 36. Petitioners further agreed that the settlements "may result in an additional tax liability to [them] plus interest as provided by law." *Id.* at 4. The IRS subsequently assessed the additional tax and interest now at issue, including interest at the enhanced rate for substantial underpayment attributable to tax motivated transactions under now-repealed 26 U.S.C. 6621(c) (1988) (former Section 6621(c)).[2]

The Tax Court issued stipulated decisions in the partnership proceedings in 2001. Pet. App. 4 n.2. Those

[2] The court of appeals referred to former Section 6621(c) interest as "penalty interest," Pet. App. 4, but this brief hereinafter refers to it as "tax motivated interest."

decisions stated that the adjustments to partnership income and expense were attributable to transactions that lacked economic substance as described in former 26 U.S.C. 6621(c)(3)(A)(v) (1988). Pet. App. 4 n.2. The decisions also stated that the assessment of any deficiencies in income tax attributable to the adjustments to partnership items was not time barred by 26 U.S.C. 6229. Pet. App. 4 n.2.

Petitioners separately filed administrative refund claims with the IRS. Pet. App. 4. Petitioners asserted that their settlement agreements and the resulting assessments had been made after the statute of limitations had expired, and, alternatively, that they were not liable for tax motivated interest under former Section 6621(c). *Id.* at 188-209. The IRS denied the claims. *Id.* at 4.

b. Petitioners commenced separate refund actions in the Court of Federal Claims, and the suits were consolidated. Pet. App. 4. The government filed a motion for partial dismissal, arguing that 26 U.S.C. 7422(h), which prohibits actions for refunds "attributable to partnership items," deprived the court of subject-matter jurisdiction.

The Court of Federal Claims granted the government's motion. Pet. App. 18-50. The court held that, under the TEFRA partnership rules, petitioners were not permitted to raise their limitations defense in a partner-level refund suit like this one. *Id.* at 26-41. The court explained that because petitioners' argument required a construction of 26 U.S.C. 6229(a), which extends the limitations period of 26 U.S.C. 6501(a) for assessing any tax attributable to partnership items, it involves a partnership item that may be raised only in the unified partnership proceeding. Pet. App. 27-28. In the alternative, the court held that petitioners had waived their limita-

tions defense in their settlement agreements. *Id.* at 32-33. The court observed that a "legion of decisions" uniformly had concluded that because the limitations issue affects the partnership as a whole, it cannot be litigated in an individual partner proceeding. *Id.* at 34-35.

The Court of Federal Claims also held that petitioners were barred from challenging the assessment of tax-motivated interest in their partner-level refund suit. Pet. App. 48-49. The court explained that imposition of interest under former Section 6621(c) depended upon the nature of the partnerships' transactions, which itself presents a partnership item. *Id.* at 44-47. The court stated that where, as here, the interest was imposed because the partnerships had conducted sham transactions, resolution of whether a transaction was a sham must occur in the partnership proceeding rather than in partner-level refund suits. *Id.* at 48-50. After the parties stipulated to the dismissal of the remaining issues, the court entered final judgment. *Id.* at 4.

c. The court of appeals affirmed. Pet. App. 1-17. The court found that 26 U.S.C. 6231(a)(3), which defines the term "partnership item," did not unambiguously resolve whether petitioners' limitations claim was a partnership item. Pet. App. 9. The court accordingly gave deference, under the principles announced in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984), to the agency interpretation of that provision reflected in 26 C.F.R. 301.6231(a)(3)-1(b). Pet. App. 9-10. The court concluded that petitioners' limitations claim was a partnership item because it was among the "legal and factual determinations that underlie the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc." of the partnership. *Id.* at 7 (quoting 26 C.F.R. 301.6231(a)(3)-1(b)); see *id.* at 9-

10. The court therefore held that Section 7422(h) barred the Court of Federal Claims from hearing petitioners' limitations claim in a partner-level refund suit. *Id.* at 11. The court explained that because the limitations claim affects the partnership as a whole, a contrary result would undermine TEFRA's goal of centralizing the treatment of partnership items and ensuring the equal treatment of partners. *Id.* at 10.

The court of appeals also held that the Court of Federal Claims lacked jurisdiction over petitioners' claims for a refund of tax motivated interest. Pet. App. 11-16. The court observed that the FPAAs had disallowed the partnerships' deductions based on, *inter alia*, the IRS's determination that the partnerships' transactions were shams. *Id.* at 12. The court noted as well that petitioners' settlement agreements with the IRS did not alter that determination. *Id.* at 15-16. Former Section 6621(c), the court explained, expressly provided that a "sham" transaction was subject to tax motivated interest. *Id.* at 12, 16. The court of appeals agreed with the Court of Federal Claims that the characterization of a partnership's transactions—including the determination whether a partnership transaction is a sham—is a partnership item. *Id.* at 14. Because petitioners' claim for refund of tax motivated interest was based on the assertion that the partnerships' transactions were not shams, the court concluded, that claim was barred by Section 7422(h). *Id.* at 13-14.

ARGUMENT

1. Petitioners contend (Pet. 7-24) that, notwithstanding 26 U.S.C. 7422(h), the Court of Federal Claims was authorized to consider their suit for refund of tax motivated interest assessed under 26 U.S.C. 6621(c)

(1988). The court of appeals correctly rejected that argument. In any event, because former Section 6621(c) was repealed in 1989, the issue is of minimal prospective importance. Further review is therefore not warranted.

a. Former Section 6621(c) was added to the Internal Revenue Code in 1984 to discourage the proliferation of abusive tax shelters. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 144(a), 98 Stat. 682; Staff of the Joint Comm. on Taxation, 98th Cong., 2d Sess., *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, at 485-486 (1984).[3] It increased the interest rate on substantial underpayments of tax attributable to "tax motivated transactions" to 120% of the otherwise applicable rate. Former Section 6621(c)(3)(A)(v) defined the term "tax motivated transaction" to include "any sham or fraudulent transaction." A "substantial underpayment" was any underpayment exceeding $1000 per tax year.

Former Section 6621(c) was repealed by the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No. 101-239, § 7721(b), 103 Stat. 2399. It was one of several provisions for which OBRA substituted a single accuracy-related penalty. See § 7721(a), 103 Stat. 2399; H.R. Rep. No. 247, 101st Cong., 1st Sess. 1388-1394 (1989). The repeal was effective for tax returns due after December 31, 1989. See OBRA § 7721(d), 103 Stat. 2400.

b. The court of appeals correctly concluded that petitioners were barred from challenging in this refund suit the assessment of tax motivated interest. Petitioners' suit is comfortably characterized as an action for a

---

[3] Former Section 6621(c) originally was enacted as Section 6621(d). It was redesignated Section 6621(c) by the Tax Reform Act of 1986, Pub. L. No. 99-514, § 1511(a), 100 Stat. 2744.

refund "attributable to partnership items" (26 U.S.C. 7422(h)). The interest became due because the IRS determined that the partnerships' transactions were sham transactions and that the resulting underpayments of tax therefore were attributable to "tax motivated" transactions (26 U.S.C. 6621(c)(3)(A) (1988)). To show that the assessment of such interest against them was improper, petitioners would need to refute the determinations, made at the partnership level in the FPAAs, that the transactions underlying their disallowed partnership deductions were shams.[4]

Section 7422(h) bars any such challenge in a refund action.[5] As the court of appeals explained (Pet. App. 13-14), the nature of a partnership's transactions—including the question whether they are tax motivated transactions for purposes of former Section 6621(c)—is

---

[4] FPAA determinations support the assessment of tax and interest against partners, unless those determinations are subsequently readjusted by the Tax Court or altered by the terms of a settlement. See 26 U.S.C. 6225(a), 6226(a) and (f), 6229(d), 6231(b)(1)(C). The Tax Court did not readjust the FPAA sham-transaction determinations (and, in fact, later upheld them), and the settlements did not alter those determinations. Pet. App. 4.

[5] The courts below viewed Section 7422(h) as a limitation on the subject-matter jurisdiction of the Court of Federal Claims, and petitioners do not dispute that characterization. Although Section 7422(h) does not use the term "jurisdiction," it implicates principles of sovereign immunity, cf. *United States* v. *Dalm*, 494 U.S. 596, 608-609 (1990), and it is properly read in conjunction with 26 U.S.C. 6226(f), which defines the scope of judicial review in partnership-level proceedings and does use the term "jurisdiction." In any event, because the government timely invoked Section 7422(h) as a ground for dismissal of petitioners' claims, the correct disposition of this case does not turn on whether Section 7422(h) is properly viewed as jurisdictional. Cf. *Kontrick* v. *Ryan*, 540 U.S. 443, 456 (2004) (noting that even non-jurisdictional rules may be "unalterable on a party's application").

a partnership item. See *Nault* v. *United States*, 517 F.3d 2, 8 (1st Cir. 2008); *RJT Invs. X* v. *Commissioner*, 491 F.3d 732, 737-738 (8th Cir. 2007); *River City Ranches #1 Ltd.* v. *Commissioner*, 401 F.3d 1136, 1144 (9th Cir. 2005); *Randell* v. *United States*, 64 F.3d 101, 107-108 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996). The nature of partnership transactions "underlie[s] the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc." of the partnership, within the meaning of 26 C.F.R. 301.6231(a)(3)-1(b). And the nature of partnership transactions "is more appropriately determined at the partnership level," 26 U.S.C. 6231(a)(3), because it affects the tax liability of all of the partners.

That tax motivated interest is not itself a partnership item (Pet. 10, 14-15) is beside the point. The dispositive question—as the statute expressly provides—is whether the interest at issue is "*attributable to* partnership items." 26 U.S.C. 7422(h) (emphasis added). Under petitioners' interpretation of Section 7422(h), the provision would have virtually no application because tax, interest, and penalties—the only items for which any taxpayer can ever claim a refund—are not themselves partnership items.

Petitioners assert (Pet. 16) that the court of appeals' decision "denies [partners] any forum" to challenge the assessment of tax motivated interest. That is incorrect. In the very partnership proceedings in which petitioners were parties, the partners challenged the IRS determination in the FPAAs that the partnerships' transactions were shams. Pet. App. 3. Petitioners had notice of that issue, but they chose to settle their cases with the IRS and receive benefits under their settlement agreements (which allowed a portion of the deductions that the IRS

originally had disallowed in full). *Id.* at 4, 49-50. The Tax Court ultimately decided the sham-transaction issue against the partners. *Id.* at 4 n.2. Section 7422(h) precludes petitioners' current effort to relitigate the issue in a refund action. Rather, TEFRA requires partners who intend to contest partnership-level issues to do so in the partnership-level proceeding. See pp. 2-3, *supra*.

c. Petitioners assert (Pet. 12-15) that the Court's intervention is necessary to resolve a purported conflict among the courts of appeals. That argument lacks merit. All the decisions cited by petitioners are readily distinguishable from the Federal Circuit's decision in this case.

Petitioners contend (Pet. 12) that the court of appeals' ruling conflicts with the Fifth Circuit's decision in *Weiner* v. *United States*, 389 F.3d 152 (2004), cert. denied, 544 U.S. 1050 (2005). As petitioners concede (Pet. 7), however, the Fifth Circuit in *Weiner* did not address the applicability of 26 U.S.C. 7422(h) to former Section 6621(c). Petitioners rely (Pet. 7, 11-13, 18-20) on *Weiner* to argue, on the merits, that tax motivated interest was improperly imposed against them because the FPAAs listed multiple grounds, which petitioners allege were "separable," for disallowance of the partnerships' deductions. See *Weiner*, 389 F.3d at 159-163. The Federal Circuit, while observing that it "would not be persuaded" by that argument in any event, held as a threshold matter that the Court of Federal Claims lacked jurisdiction to consider it. Pet. App. 16. Nothing in *Weiner* is inconsistent with that holding.

Petitioners also contend that the decision in this case conflicts with the Second Circuit's decision in *Field* v. *United States*, 328 F.3d 58 (2003). Although the court in *Field* held that the district court could consider the

claim for refund of tax motivated interest in that case, the case did *not* address petitioners' particular claim, *i.e.*, whether the court could make a partner-level determination regarding the nature of partnership transactions. Rather, the taxpayers' refund claim in *Field* presented the distinct question whether tax motivated interest constituted "interest" under 26 U.S.C. 6601 or was instead a penalty (as relevant for statute-of-limitations purposes). See *Field* v. *United States*, 381 F.3d 109, 111 (2d Cir. 2004).

The Ninth Circuit's decision in *Keller* v. *Commissioner*, 568 F.3d 710 (2009), is also distinguishable. *Keller* was a collection due process case, not a refund suit, and thus did not implicate Section 7422(h) at all. Further, the court in the partnership proceeding in *Keller* had erroneously concluded that it lacked jurisdiction to determine whether the partnerships' transactions were tax motivated. *Id.* at 715. The Ninth Circuit held, under the unique circumstances of that case, that the Tax Court (which possessed jurisdiction under 26 U.S.C. 6330(c)(2)(B) to consider the taxpayers' liability if the taxpayers had received no prior opportunity to dispute it) could examine the partnership-level decision and evidence as to whether the partnership transactions were tax motivated. *Keller*, 568 U.S. at 723. The Ninth Circuit emphasized, however, that "[i]n exercising this jurisdiction the Tax Court should not be making an independent judgment at the partner level about whether partnership transactions were tax motivated." *Ibid.* The Court explained, as it had held in *River City Ranches #1 Ltd.*, that the character of partnership

transactions is a partnership item to be determined at the partnership level. *Id.* at 722.[6]

d. In any event, as noted above (p. 8, *supra*), former Section 6621(c) was repealed in 1989. See OBRA, § 7721(b), 103 Stat. 2399. The only transactions to which that repealed interest provision could apply were reported on tax returns due to be filed on or before December 31, 1989. See § 7721(d), 103 Stat. 2400. The statute does not apply to any new transactions. Although petitioners' counsel has filed "many AMCOR related refund suits" (Pet. 20), and claims to "represent many more partners with similar refund claims" (*ibid.*), the universe of taxpayers potentially affected by former Section 6621(c) is necessarily finite and diminishing. Petitioners' conjecture that "likely there are thousands more § 6621(c) claims" (Pet. 21) strains credulity, as the statute was repealed 20 years ago.[7] The issue raised in the petition therefore is one of limited and declining importance.

---

[6] Petitioners also suggest (Pet. 15) that the decision below conflicts with the Federal Circuit's prior decision in *Prochorenko* v. *United States*, 243 F.3d 1359 (2001). But unlike *Prochorenko*, which involved an issue "entirely dependent on [the partner's] own unique factual circumstances" (*id.* at 1363), this case involves issues that affect all partners and are not dependent on facts unique to a particular partner (Pet. App. 14). In any event, any intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[7] Petitioners note (Pet. 21) that cases arising out of the Hoyt tax-shelter partnerships also involved former Section 6621(c). The Ninth Circuit's decisions, however, have largely resolved those issues. See *Keller*, 568 F.3d at 710; *River City Ranches* v. *Commissioner*, 313 Fed. Appx. 935, 938 (9th Cir. 2009); *River City Ranches #1 Ltd.*, 401 F.3d at 1136.

2. Petitioners also contend (Pet. 25-33) that the Court of Federal Claims should have entertained their limitations defense to the assessments in a partner-level refund suit. The court of appeals correctly rejected that argument, and its holding is consistent with the decisions of all other court of appeals that have considered the question. The issue therefore does not warrant this Court's review.

a. After the completion of partnership proceedings, any income tax attributable to partnership items is assessed at the partner level. See 26 U.S.C. 701. The IRS has the greater of the three-year period in 26 U.S.C. 6501 (which is based on the partner's individual return) or the three-year period in 26 U.S.C. 6229(a) (which is based on the partnership return) to make an assessment attributable to a partnership item. See *AD Global Fund, LLC* v. *United States*, 481 F.3d 1351, 1354 (Fed. Cir. 2007). The issuance of an FPAA suspends the statute of limitations during the time that a petition for readjustment of partnership items may be filed, and for one year thereafter. 26 U.S.C. 6229(d).

b. The court of appeals correctly held that petitioners' refund claim that the assessments were made after the limitations period had expired is a partnership item and is therefore barred by Section 7422(h). Petitioners' limitations claim "is more appropriately determined at the partnership level," 26 U.S.C. 6231(a)(3), because it requires a construction of 26 U.S.C. 6229 and therefore affects the tax liability of all of the partners.[8] The limi-

[8] For example, adjudicating petitioners' limitations claim would require determinations as to whether the FPAAs were issued in time to suspend the limitations period, 26 U.S.C. 6229(d), and whether the "tax matters" partner had agreed to extend the limitations period, 26 U.S.C. 6229(b)(1)(B).

tations issue also "underlie[s] the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc." of the partnership, within the meaning of 26 C.F.R. 301.6231(a)(3)-1(b). As the court of appeals noted, petitioners "do not dispute that this regulation includes their limitations claim in its definition of 'partnership items.'" Pet. App. 8.

Contrary to petitioners' contention (Pet. 30-31), the court of appeals properly deferred to the agency's interpretation of the term "partnership item." That regulation was adopted pursuant to the congressional directive contained in 26 U.S.C. 6231(a)(3). When Congress authorizes an agency to promulgate rules addressing a specific area of concern, regulations adopted under that authority "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-844.

Petitioners argue (Pet. 26) that under the court of appeals' decision, partners "have *no* court of competent jurisdiction in which to raise their limitations defense" for pre-1997 taxable years. That is incorrect. The limitations defense was raised in the very partnership proceedings in which petitioners were parties, Pet. App. 3, but petitioners chose to settle their cases, *id.* at 4. Petitioners' related contention (Pet. 25) that they were "barred by statute" from pursuing their limitations defense in the partnership proceedings is similarly incorrect. See, *e.g.*, *Rhone-Poulenc Surfactants & Specialties, L.P.* v. *Commissioner*, 114 T.C. 533, 535 (2000); C-99 Ltd. v. *Commissioner*, 66 T.C.M. (CCH) 1485, 1486-1488 (1993); *Genesis Oil & Gas, Ltd.* v. *Commissioner*, 93 T.C. 562, 564 (1989). In any event, as petitioners acknowledge (Pet. 25 n.26), a 1997 amendment expressly permits partners to participate in partnership

proceedings solely for the purpose of asserting that the limitations period had expired. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1239(b), 111 Stat. 1027 (adding concluding clause to 26 U.S.C. 6226(d)(1)). Even if petitioners could demonstrate that the former statutory scheme raised significant due process concerns, their constitutional claims are thus of little prospective importance.

c. In any event, petitioners do not allege a conflict between the court of appeals' disposition of the limitations issue and any decision of another court of appeals. To the contrary, the Federal Circuit's decision is in agreement with that of every other court of appeals to have considered the question. Four other courts of appeals have held that the limitations defense that petitioners sought to raise here is a partnership item that cannot be raised in a partner-level proceeding. See *Weiner*, 389 F.3d at 159; *Davenport Recycling Assocs.* v. *Commissioner*, 220 F.3d 1255, 1260 (11th Cir. 2000); *Chimblo* v. *Commissioner*, 177 F.3d 119, 125 (2d Cir. 1999), cert. denied, 528 U.S. 1154 (2000); *Kaplan* v. *United States*, 133 F.3d 469, 474 (7th Cir. 1998). Absent a conflict among the courts of appeals, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN A. DICICCO
Acting Assistant Attorney General
MICHAEL J. HAUNGS
DEBORAH K. SNYDER
Attorneys

AUGUST 2009